

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CYNTHIA F. WALSH,

Plaintiff,

v.

HEALTH MANAGEMENT  
ASSOCIATES, INC., a Delaware  
Corporation, d/b/a YAKIMA HMA,  
INC., d/b/a YAKIMA HMA, LLC,  
d/b/a YAKIMA REGIONAL  
MEDICAL CENTER,

Defendant.

NO: 11-CV-3125-TOR

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS PLAINTIFF'S  
SECOND AMENDED COMPLAINT  
FOR FAILURE TO STATE A CLAIM

BEFORE THE COURT is Defendant's Motion to Dismiss Plaintiff's

Second Amended Complaint for failure to state a claim (ECF. No. 24). This matter  
was heard without oral argument on April 23, 2012. The Court has reviewed the  
motion, the response, and the reply, and is fully informed.

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## PROCEDURAL HISTORY

2 Plaintiff, Cynthia Walsh (“Walsh”), filed a First Amended Complaint (ECF  
3 No. 7) on June 14, 2011, asserting five causes of action: (1) unlawful discharge  
4 from employment due to age, sex and physical limitation in violation of the  
5 Washington Law Against Discrimination (“WLAD”); (2) failure to accommodate a  
6 physical limitation in violation of the WLAD; (3) unlawful retaliation in violation  
7 of the WLAD; (4) failure to provide meal and break periods in violation of  
8 Washington’s Industrial Welfare Act, RCW Chapter 49.12; and (5) breach of an  
9 implied contract of employment. The Court dismissed the First Amended  
10 Complaint on February 3, 2012, for failure to adequately support each cause of  
11 action with factual allegations. ECF No. 22. The Court did, however, grant Walsh  
12 leave to file a second amended complaint within fifteen (15) days. ECF No. 22.

13           Walsh filed a Second Amended Complaint on February 14, 2012. ECF No.  
14       23. The Second Amended Complaint asserts the same causes of action for  
15       unlawful discharge due to age, sex and physical limitation, failure to accommodate  
16       a physical limitation, unlawful retaliation under the WLAD, and failure to provide  
17       meal and break periods.<sup>1</sup> It also alleges two new causes of action under

<sup>19</sup> The Second Amended Complaint does not reassert Walsh's claim for breach of  
<sup>20</sup> an implied employment contract.

1 Washington common law for retaliation and wrongful termination in violation of  
2 public policy. ECF No. 23.

3 On February 29, 2012, Defendant Yakima Regional Medical Center (“the  
4 Hospital”) moved to dismiss Walsh’s statutory claims for unlawful discharge,  
5 failure to accommodate, unlawful retaliation, and failure to provide meal and break  
6 periods for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).  
7 ECF No. 24. The Hospital does not challenge the sufficiency of Walsh’s common  
8 law claims for retaliation and wrongful termination in violation of public policy in  
9 this motion. ECF No. 25 at 2.

10 **BACKGROUND**

11 Plaintiff Cynthia Walsh is a former employee of Defendant Yakima  
12 Regional Medical Center. From 1992 to September of 2008, Walsh was employed  
13 by the Hospital as a respiratory therapist. In this position, Walsh’s primary  
14 function was to aid patients with breathing during surgery and during rehabilitation  
15 in the hospital’s intensive care unit.

16 On May 25, 2008, Walsh was diagnosed with a condition known as Achilles  
17 insertional calcific tendonosis in her left foot. Believing that this condition had  
18 been caused by her employment as a respiratory therapist, Walsh filed a claim for  
19 workers compensation benefits with the Washington Department of Labor and  
20 Industries. Because the condition limited her ability to perform the ordinary duties

1 of a respiratory therapist, Walsh also requested an accommodation from the  
2 Hospital.

3 The Hospital allowed Walsh to perform “light duty” work as an  
4 accommodation of her Achilles condition from late May to early September of  
5 2008. On September 8, 2008, the Hospital discontinued Walsh’s “light duty”  
6 assignment. Rather than granting Walsh a further accommodation, the Hospital  
7 terminated her employment and placed her on “time loss compensation benefits”  
8 managed by the Hospital. Pl.’s Second Am. Compl., ECF No. 23, at ¶ 2.48.

## 9 ANALYSIS

10 The Court has previously set forth in detail the standards by which a  
11 complaint is evaluated on a motion to dismiss for failure to state a claim. *See* ECF  
12 No. 22 at 2-3. Those same standards apply to the instant motion. In brief,  
13 dismissal of a complaint for failure to state a claim pursuant to Federal Rule of  
14 Civil Procedure 12(b)(6) is only warranted when the complaint fails to present a  
15 “cognizable legal theory” or contains insufficient facts to support potential relief  
16 under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696,  
17 699 (9t Cir. 1990). “Threadbare recitals of the elements of a cause of action,  
18 supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556  
19 U.S. 662, 678 (2009). Even when a complaint fails to state a claim for relief,  
20 however, “[d]ismissal without leave to amend is improper unless it is clear that the

1 complaint could not be saved by an amendment.” *Harris v. Amgen, Inc.*, 573 F.3d  
2 728, 737 (9th Cir. 2009). The standard for granting leave to amend is generous.  
3 The court considers five factors in assessing the propriety of leave to amend—bad  
4 faith, undue delay, prejudice to the opposing party, futility of amendment, and  
5 whether the plaintiff has previously amended the complaint. *United States v.*  
6 *Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

7 **A. Age and Gender Discrimination**

8 The WLAD protects employees age 40 and over from discrimination on the  
9 basis of age. RCW 49.44.090(1). “To make out a prima facie case of age  
10 discrimination, an employee must show that: (1) she was within the statutorily  
11 protected age group; (2) was discharged; (3) was doing satisfactory work; and (4)  
12 was replaced by a younger person.” *Balkenbush v. Ortho Biotech Prods., L.P.*, 653  
13 F.Supp. 2d 1115, 1122 (E.D. Wash. 2009) (citing *Grimwood v. University of Puget*  
14 *Sound, Inc.*, 110 Wash.2d 355, 362, 753 P.2d 517 (1988)).

15 The WLAD also protects employees from discrimination on the basis of  
16 gender. “To establish a prima facie case of gender discrimination, an employee  
17 must prove: (1) membership in a protected class; (2) the employee is qualified for  
18 the job or performing substantially equal work; (3) an adverse employment  
19 decision, including termination or denial of promotion; and (4) selection by the  
20 employer of a replacement or promoted person from outside the protected class.”

1     *Id.* (citing *Kuest v. Regent Assisted Living, Inc.*, 111 Wash.App. 36, 44, 43 P.3d 23  
2 (2002)).

3                 The Court previously ruled that Walsh's First Amended Complaint failed to  
4 state a claim for age and gender discrimination. ECF No. 22 at 5-6. With respect  
5 to the age discrimination claim, the Court ruled that Walsh had not sufficiently  
6 alleged that she was doing "satisfactory work" as a respiratory therapist at the time  
7 of her termination in September of 2008. ECF No. 22 at 5. Similarly, with respect  
8 to the gender discrimination claim, the Court ruled that Walsh had not sufficiently  
9 alleged that she was "qualified" to work as a respiratory therapist or capable of  
10 performing "substantially equal work" when she was terminated, "particularly in  
11 view of the work restrictions imposed on her after May 2008." ECF No. 22 at 5.  
12 The Court further ruled that Walsh's First Amended Complaint contained nothing  
13 more than a "threadbare recital" of the final elements of both claims: that she was  
14 replaced by a younger employee and/or was replaced by a male employee. ECF  
15 No. 22 at 6. "In sum," the Court ruled, "Plaintiff fails to allege how age and  
16 gender factored into her termination." ECF No. 22 at 6.

17                 Walsh's Second Amended Complaint does not remedy the deficiencies  
18 identified in the Court's prior order. First, Walsh has still failed to allege that she  
19 was doing "satisfactory work" as a respiratory therapist when she was terminated  
20 on September 8, 2008. Indeed, Walsh has failed to allege that she performed *any*

1 work as a respiratory therapist following the diagnosis of her Achilles condition in  
2 May of 2008. Similarly, Walsh has still failed to allege that she was “qualified” to  
3 perform the duties of a respiratory therapist or that she was capable of performing  
4 “substantially equal work” when she was terminated. Once again, Walsh’s  
5 allegations that she required an accommodation for her Achilles condition (*i.e.*,  
6 “light duty” work) indicate that she was neither performing “satisfactory work” as  
7 a respiratory therapist nor “qualified” to perform such work (or “substantially  
8 equal” work) when she was terminated on September 8, 2008.

9 Moreover, Walsh has still failed to adequately allege how age or gender  
10 factored into the Hospital’s decision to terminate her. Although Walsh has  
11 supplemented her complaint with three general allegations of age and gender  
12 discrimination made “on information and belief” (*see* Pl.’s Second Am. Compl.,  
13 ECF No. 23, at ¶¶ 2.45, 2.105, 2.106), these allegations amount to mere  
14 speculation and are therefore insufficient to state a claim for relief. *See Bell*  
15 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“Factual allegations must be  
16 enough to raise a right to relief above the speculative level[.]”). At bottom, the  
17 only new allegation relevant to Walsh’s age and gender discrimination claims is  
18 that “HMA replaced Walsh with contracted, lower paid, temporary, male traveling  
19 respiratory therapists.” Pl.’s Second Am. Compl., ECF No. 23, at ¶ 2.103. This  
20 too is insufficient to state a claim for age or gender discrimination. *See Iqbal*, 556

1 U.S. at 678. Walsh's claims for age and gender discrimination are hereby  
2 dismissed.

3 **B. Disability Discrimination (Disparate Treatment)**

4 A disabled employee has two causes of action under the WLAD: “[1] for  
5 failure to accommodate, when the employer fails to take steps reasonably  
6 necessary to accommodate an employee’s condition, and [2] for disparate  
7 treatment, when the employer discriminates against an employee because of the  
8 employee’s condition.” *Johnson v. Chevron U.S.A., Inc.*, 159 Wash.App. 18, 27-  
9 28, 244 P.3d 438, 443 (2010) (internal quotations and citations omitted). “An  
10 employee alleging disability discrimination must establish that he or she (1) is in a  
11 protected class (disabled), (2) was discharged, (3) was doing satisfactory work, and  
12 (4) was replaced by someone not in the protected class.” *Roeber v. Dowty Aerospace Yakima*, 116 Wash.App. 127, 135, 64 P.3d 691, 696 (2003).

13 Ultimately, a disabled employee must prove that discriminatory intent was  
14 “substantial factor” in the employer’s decision to terminate. *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 149, 94 P.3d 930, 936 (2004). In order to survive a motion  
16 to dismiss for failure to state a claim, however, a disabled employee need only  
17 allege facts sufficient to establish each element of the prima facie case. *See id.* at  
18 149-50, 94 P.3d 930, 936 (noting that presenting a prima facie case gives rise to a  
19 presumption of discriminatory motive sufficient to withstand summary judgment).

1       The Court previously ruled that Walsh's First Amended Complaint failed to  
2 sufficiently allege that Walsh was doing satisfactory work and that she was  
3 replaced by a non-disabled employee. ECF No. 22 at 7. This ruling was based  
4 upon Walsh's "threadbare recitals" that she had performed "excellent work," that  
5 she was "capable of performing all the essential functions of the job," and that she  
6 was "replaced by employees who did not have a disability." *See* Pl.'s First Am.  
7 Compl., ECF No. 7, at ¶¶ 2.17-18, 2.22. Walsh has subsequently amended her  
8 complaint to include the following additional allegations: (1) "Walsh never had  
9 anything less than positive evaluations, reviews, and feedback in her sixteen years  
10 of employment with HMA;" (2) "Walsh had never had any adverse employment  
11 actions taken against her in sixteen years of employment with HMA."<sup>2</sup> Pl.'s  
12 Second Am. Compl., ECF No. 23, at ¶¶ 3.24-25. These allegations do not  
13 specifically support her bare assertion that she "was doing satisfactory work *at the*  
14 *time of termination.*" *See* Pl.'s Second Am. Compl., ECF No. 23, at ¶ 3.5  
15 (emphasis added).

16  
17  
18       <sup>2</sup> The Court notes that these allegations are made in support of Walsh's common  
19 law retaliation claim and were not incorporated by reference into her disability  
20 discrimination claim.

1 Moreover, Walsh has failed to supplement her complaint with further  
2 allegations concerning replacement by a non-disabled employee. Like her former  
3 allegation that she was “replaced by employees who did not have a disability” (*see*  
4 Pl.’s First Am. Compl., ECF No. 7, at ¶ 2.22), Walsh’s current allegation that she  
5 “was replaced by a younger person, a male and a person without a disability” (*see*  
6 Pl.’s Second Am. Compl., ECF No. 23, at ¶ 3.6) is nothing more than a “threadbare  
7 recital” of the last element of her claim. Accordingly, Walsh has once again  
8 pleaded insufficient facts to state a claim for disability discrimination under the  
9 WLAD. This claim is therefore dismissed.

10 **C. Failure to Accommodate**

11 As noted above, a disabled employee may bring a cause of action under the  
12 WLAD for either disability discrimination or for failure to accommodate his or her  
13 disability. *Johnson*, 159 Wash.App. at 27-28, 244 P.3d 438, 443. To establish a  
14 *prima facie* case of failure to accommodate, a plaintiff must show: “(1) the  
15 employee had a sensory, mental, or physical abnormality that substantially limited  
16 his or her ability to perform the job; (2) *the employee was qualified to perform the*  
17 *essential functions of the job in question*; (3) the employee gave the employer  
18 notice of the abnormality and its accompanying substantial limitations; and (4)  
19 upon notice, the employer failed to affirmatively adopt measures that were  
20 available to the employer and medically necessary to accommodate the

1 abnormality.” *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 532 (2003) (emphasis  
2 in original) (quotation and citation omitted).

3       The Court previously indicated that Walsh’s failure to accommodate claim  
4 suffered from the same deficiency as her age and gender discrimination claims—  
5 *i.e.*, a “fail[ure] to factually allege how she remained ‘qualified’ to perform the  
6 ‘essential functions’ of her job as a respiratory therapist, notwithstanding her  
7 alleged disability and the physical restrictions imposed upon her.” ECF No. 22 at  
8 7. As discussed above, Walsh’s Second Amended Complaint has failed to cure  
9 this deficiency. Given that Walsh has neither identified the “essential functions” of  
10 her job as a respiratory therapist nor alleged how she remained qualified to perform  
11 those essential functions after suffering her alleged disability, she has failed to state  
12 a claim for failure to accommodate her *in a respiratory therapist capacity*. See  
13 *Davis*, 149 Wash.2d at 535, 70 P.3d 127, 133-34 (granting judgment as a matter of  
14 law in favor of employer where employee failed to present any evidence that he  
15 remained qualified to perform the essential functions of his existing job after he  
16 became disabled). To the extent that Walsh wishes to pursue such a claim, she  
17 may have **fifteen (15) days** to amend her complaint a third and final time.

18       However, Walsh has now stated a claim for failure to accommodate on a  
19 separate theory: that the Hospital unreasonably declined to reassign her to a  
20 different job. *See Davis*, 149 Wash.2d at 536-38, 70 P.3d 126, 134-35

1 (recognizing independent viability of “accommodation in current job” and  
2 “accommodation by reassignment” theories in failure to accommodate case). In  
3 her Second Amended Complaint, Walsh alleges that one reasonable  
4 accommodation would have been for the Hospital to assign her to a different  
5 position until her Achilles condition had healed. *See* Pl.’s Second Am. Compl.,  
6 ECF No. 23, at ¶ 2.18. Walsh further alleges that, at the time she was terminated,  
7 “HMA had many positions available at its Yakima hospital facility.” *See* Pl.’s  
8 Second Am. Compl., ECF No. 23, at ¶ 2.38. Finally, Walsh alleges that she “had  
9 worked at the hospital for sixteen years, and worked in medicine for 30 years, and  
10 had many qualifications and life experiences that made her a unique and special  
11 individual equipped to perform many jobs throughout the Hospital with an  
12 accommodation.” *See* Pl.’s Second Am. Compl., ECF No. 23, at ¶ 2.39. These  
13 allegations are sufficient to state a claim for failure to accommodate on an  
14 “accommodation by reassignment” theory. *See Davis*, 149 Wash.2d at 536, 70  
15 P.3d 126, 134.

16 Finally, the Court notes that Washington law does not appear to require a  
17 disabled employee to request a *specific* accommodation in order to prevail on a  
18 failure to accommodate claim. The Hospital’s citation to *Pulcino v. Fed. Express*  
19 *Corp.*, 141 Wash.2d 629, 643, 9 P.3d 787 (2000), *overruled in part on other*  
20 *grounds by McClarty v. Totem Elec.*, 157 Wash.2d 214 (2006), for this proposition

1 is unavailing. Nowhere in *Pulcino* did the Washington Supreme Court state that a  
2 plaintiff must make an “initial showing that he or she requested a specific  
3 accommodation that was both reasonable and available.” Rather, *Pulcino* merely  
4 states that an employee must show “that a specific reasonable accommodation was  
5 *available* to the employer at the time the employee’s physical limitation became  
6 known.” 141 Wash.2d at 634, 9 P.3d 787, 795 (emphasis added).

7       While an employee may certainly suggest a specific accommodation, he or  
8 she is not required to do so as a matter of law. *See Davis*, 149 Wash.2d at 536-37,  
9 70 P.3d 126, 134 (“The employer must take affirmative steps to assist the  
10 employee in the internal job search by determining the extent of the employee’s  
11 disability, by inviting the employee to receive personal help from the employer’s  
12 personnel office, and by sharing with the employee all job openings in the  
13 company.”). Indeed, limiting the universe of “reasonable accommodations” to  
14 those that have been specifically requested by the employee would artificially limit  
15 the employer’s duty to “reasonably accommodate” the employee. *See Goodman v.*  
16 *Boeing Co.*, 127 Wash.2d 401, 408-09, 899 P.2d 1265, 1269-70 (“Reasonable  
17 accommodation thus envisions an exchange between employer and employee  
18 where each seeks and shares information to achieve the best match between the  
19 employee’s capabilities and available positions.”). Accordingly, Walsh’s failure to  
20

1 allege that she specifically requested any particular accommodation other than  
2 “light duty” work is immaterial at this stage of the proceedings.

3 **D. Retaliation**

4 RCW 49.60.210(1) provides that, “[i]t is an unfair practice for any employer,  
5 employment agency, labor union, or other person to discharge, expel, or otherwise  
6 discriminate against any person because he or she has opposed any practices  
7 forbidden by this chapter, or because he or she has filed a charge, testified, or  
8 assisted in any proceeding under this chapter.” To state a prima facie case for  
9 retaliation in violation of RCW 49.60.210, a plaintiff must show that: (1) he or she  
10 engaged in protected activity; (2) the employer took adverse employment action;  
11 and (3) there is a causal link between the protected activity and the adverse action.

12 *Milligan v. Thompson*, 110 Wash.App. 628, 638, 42 P.3d 418, 424 (2002).

13 As the Court previously noted in its order dismissing Walsh’s First  
14 Amended Complaint, it is unclear whether filing a claim for workers’  
15 compensation benefits and requesting an accommodation for a disability constitute  
16 “protected activity” under the WLAD. ECF No. 22 at 8. Walsh has not offered  
17 any further analysis of this issue. Nevertheless, Given that Walsh has sufficiently  
18 supplemented her complaint with additional allegations of retaliation, the Court is  
19 inclined to allow Walsh to pursue her WLAD-based retaliation claims concurrently  
20 with her newly-asserted common law retaliation claims. The Court notes,

1 however, that the ultimate success of Walsh's WLAD-based retaliation claims is  
2 contingent upon her ability to prove, *inter alia*, an underlying violation of the  
3 WLAD itself. *See Griffith v. Boise Cascade, Inc.*, 111 Wash.App. 436, 444-45, 45  
4 P.3d 589, 594 (2002) (affirming dismissal of wrongful termination in violation of  
5 public policy claim based upon request for reasonable accommodation under the  
6 WLAD where employee was unsuccessful on underlying failure to accommodate  
7 claim).

8 **E. Meal and Break Periods**

9 Walsh has now stated a claim for failure to provide adequate meal and break  
10 periods in violation of WAC 296-126-092. Specifically, Walsh has alleged that (1)  
11 she "repeatedly requested meal and break periods to [sic] her supervisor, and her  
12 requests were repeatedly denied by HMA;" (2) "she never punched in or out for  
13 meal or break periods;" and (3) evidence of the fact that she did not take meal or  
14 break periods is reflected in her time cards, which are in the Hospital's possession.

15 Pl.'s Second Am. Compl., ECF No. 23, at ¶¶ 3.34-36; *see also* ¶¶ 2.108-115.

16 These facts are sufficient, particularly in view Walsh's apparent inability to make  
17 more specific allegations without access to her timecards.

18 Although the Hospital has raised a legitimate question about whether the  
19 alleged violations occurred within the three-year statute of limitations period, the  
20 Court will reserve ruling on this issue until after Walsh has had an opportunity to

1 examine her timecards. For the time being, Walsh's allegation that she was denied  
2 meal and break periods "just before [she] suffered her injury in May 2008" is  
3 sufficient to state a claim for a violation within the three-year statute of limitations  
4 period ending on May 17, 2011. Pl.'s Second Am. Compl., ECF No. 23, at ¶  
5 2.108.

6 ACCORDINGLY, IT IS HEREBY ORDERED:

- 7 1. Defendant's Motion to Dismiss is **GRANTED** as to Plaintiff's claims  
8 for (1) age discrimination; (2) gender discrimination; and (3) disability  
9 discrimination.
- 10 2. Defendant's Motion to Dismiss is **DENIED** as to Plaintiff's claims for  
11 (1) failure to accommodate; (2) WLAD-based retaliation; and (3) denial  
12 of meal and break periods.
- 13 3. Plaintiff may file a third and final amended complaint in an effort to  
14 remedy the deficiencies identified herein **within fifteen (15) days** of the  
15 date of this order.

16 The District Court Executive is hereby directed to enter this Order and  
17 provide copies to counsel.

18 **DATED** this 23<sup>rd</sup> day of April, 2012.

19 *s/ Thomas O. Rice*

20 THOMAS O. RICE  
United States District Judge